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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

RACHAEL SCARLETT MULLENIX,

Defendant and Appellant.

G041068

(Super. Ct. No. 06WF2607)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, David A. Thompson, Judge. Affirmed.

Randall Bookout, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Gil Gonzalez and Lynne G. McGinnis, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury convicted Rachael Scarlett Mullenix of first degree murder for the stabbing death of her mother, Barbara Mullenix, but found the allegation she personally used a knife in the slaying not to be true. (Pen. Code, §§ 187, subd. (a), 12022, subd. (b)(1); all further unlabeled statutory references, except as noted in part II.C., *infra*, are to the Penal Code.) In a separate trial, a different jury also convicted defendant's boyfriend, Ian Allen, of the murder. The issues in this appeal concern claims of prosecutorial misconduct and whether admission of defendant's prior assault on her mother constituted reversible error.

Parties to an appeal routinely disagree on the issues, but rarely are we presented with such divergent viewpoints. Defendant contends the record shows a prosecutor who deliberately engaged in numerous instances of egregious misconduct to obtain a conviction. In contrast, the Attorney General asserts the prosecutor committed no misconduct at all and, based on the trial court's "repeated unjustified criticisms of the prosecutor, the party who received an unfair trial was the People." The trial court did indeed express exasperation with the prosecutor several times, and on one occasion observed outside the presence of the jury, "It just seems to me the [prosecutor is] willing to go to any length, whether it's permissible or impermissible to try to convict this defendant. I don't understand why. You have a great case. There is no reason to continually, intentionally violate the rules." Ironically, while the Attorney General criticizes the trial court for overzealously monitoring the prosecutor, the Attorney General relies on that very intervention to argue any prosecutorial misconduct was harmless.

We conclude the prosecutor committed several instances of misconduct, but the trial court's diligent efforts, including sua sponte admonishing the prosecutor and

curing any potential harm by instructing the jury to ignore her remarks, assured the defendant of a fair trial and prevented the necessity of a reversal. Defendant's contention the trial court erroneously admitted prior domestic violence evidence is without merit. We therefore affirm the judgment.

I

FACTUAL AND PROCEDURAL BACKGROUND

On September 13, 2006, the Newport Beach Police Department found the body of Barbara Mullenix floating in Newport Harbor. She suffered more than 50 stab wounds; criminalists later determined three or four different knives had been used in the murder. A butter knife remained embedded beneath one eye, with the handle protruding from the victim's eye socket. The body was wrapped in sheets and a blanket. Investigators found a half-closed, four-inch pocket knife in the bedding. They also found a cardboard box for a large television floating near the body. Laboratory testing revealed the DNA of the victim's daughter, defendant, on the duct tape used to seal the box.

Defendant lived in Huntington Beach with her mother and father, who were divorced but shared a home. Seventeen years old, defendant had been dating Ian Allen, age 21, for several months, since May 2006. Her parents did not approve of the relationship; her mother at one point threatened to file statutory rape charges against Allen. But defendant extracted a signed agreement from both her parents that she could continue to see Allen. The relationship, however, still troubled Barbara and Bruce.¹ In August, for example, a neighbor heard defendant and her mother arguing in their condominium parking lot about defendant's plans to leave with a young man in his truck.

¹ We use the first names of defendant's parents for clarity and ease of reference, and intend no disrespect. (See *In re Marriage of Olsen* (1994) 24 Cal.App.4th 1702, 1704, fn. 1.)

Bruce testified the majority of arguments between defendant and her mother were “probably” about Allen.

Bruce also testified Barbara had a serious drinking problem, that she verbally abused defendant when she drank, and that the police responded to their home several times to defuse mother and daughter confrontations. Former neighbors from Oklahoma testified they called the police in 2002 when defendant, who was 12 or 13 at the time, showed up on their doorstep claiming her mother had assaulted her. The neighbors observed a “very apparent” human bite mark on defendant’s back. Her mother soon arrived, drunk and angry. Defendant later told the Oklahoma prosecutor that she fabricated her account of her mother’s assault.

Barbara and her daughter lived in Tampa, Florida, in 2004, and a sheriff’s deputy from there testified he responded to a 911 call of an “aggravated assault” at Barbara’s townhome. He found Barbara there “crying, uncooperative,” and she seemed “very nervous” and “upset.” She was injured, and her injuries did not appear to be self-inflicted.² The victim remained “uncooperative,” but the deputy “obtain[ed] a name from her” identifying her daughter as the attacker. After the deputy verified defendant was not still in the house, he called her on her cell phone to ask her about the incident. Defendant stated she and her mother “got in an argument and she left. And that was it.” Defendant hung up and would not answer the deputy’s subsequent calls. The deputy filed a report with the prosecutor, but no charges resulted.

In late August 2006, two weeks before her murder, Barbara stormed over to Allen’s house, waking his mother, because defendant violated her 1:00 a.m. curfew.

² Under Evidence Code section 352, the trial court excluded the fact it appeared her injuries had been inflicted with a knife.

Barbara berated defendant, “Are you on drugs? What are you still doing here?” She forced defendant to return home and forbade her from seeing Allen.

In her diary, defendant wrote about the incident: “We woke up at 1:20 at his house and rushed out the door. And when we opened the door, my mom was standing there. I was humiliated. I wanted to die right there! [¶] Before this happened, like a week or so ago, my mom showed up at his job and got him fired. I wish she could just let me be happy” About 10 days after the incident, on September 10th, defendant wrote that matters were getting worse: “She [Barbara] is fucking crazy. She threatens me every day. All over Ian, either she’s threatening to do something to him or me. And it is constant.” The entry continued: “I have HPV, stage one. She’s saying that she’s going to Ian’s mom [to] tell her all about it. What bullshit. She has no right. This should be my decision to tell someone that, not hers. She is such a bitch! [¶] One day she will threaten the wrong person and they will beat the living shit out of her” Another diary entry read: “Life and death. Life, death. What does it mean? Some people get great lives and some people, well Do you know what the kids with bad homes do? They cut, do drugs, commit murder, burn themselves, cause harm to others. They say to turn to God. Give me a break. God does not control life and He doesn’t control death. So try to survive in this horrible world. Life and death.”

On September 8, Allen requested two days off of work, September 12th and 13th. His employer could not recall whether Allen explained he needed the days off to help move his girlfriend’s mother or his girlfriend, but it was one of the two.

On September 11, Allen tried to reach his friend, Ryan Wofford, by telephone. Wofford spoke to Allen the next day. Allen told Wofford he would be leaving work that afternoon, September 12th, to attend a party at his supervisor’s house,

and he wanted Wofford to give him and defendant a ride home between 2:00 and 5:00 a.m. from Newport Beach because they would be drinking and unable to drive. Wofford refused, but Allen insisted, offering to pay Wofford gas money. Wofford agreed.

Between 3:00 and 3:30 a.m. on September 13th, Allen telephoned Wofford several times to check on his location and directed Wofford to pick him up at an intersection in Corona del Mar. The police later found Barbara's Volvo station wagon parked a few blocks away. Defendant and Allen were waiting for Wofford when he arrived. Neither appeared to have been drinking. Allen directed Wofford to defendant's home. Wofford, who was driving under the speed limit and had not been drinking, found it odd that Allen repeatedly warned him to slow down because "there was a lot of police activity in the area" and Allen did not want to get pulled over. Wofford dropped the pair off at defendant's condominium.

Earlier, between 2:00 and 3:00 a.m., a neighbor sharing a common wall with the Mullenix condominium was "awakened by some commotion, some banging around. Sounded like banging up against the wall and also the sliding glass door that leads out into the back patio area." The neighbor heard a male and a female and then two females arguing. He considered calling the police, but the noise stopped. Before he had been informed Barbara was dead, the neighbor told the officer who took his report that he would not have been surprised if a murder had taken place.

Another neighbor awoke around the same time to the sound of a screen door slamming, and then heard a noise that sounded like a cardboard box being dragged from the Mullenix residence. He saw two people near Barbara's Volvo, including defendant. One of the individuals closed the tailgate door of the station wagon and the

vehicle drove away. Around 7:00 a.m., the neighbor saw Allen drive away from the condominium with trash bags in the back of his truck.

Bruce, who was on a business trip, tried to telephone Barbara and defendant the morning of September 13th, but could not reach either one. Around 9:00 or 9:30 a.m., Allen showed up at his work site and asked if he could use the dumpster. Allen, according to one employee, “seemed like he was a little sweaty and had been doing work.” He and defendant discarded “quite a few” black trash bags in the dumpster. The police later recovered in the dumpster Barbara’s wallet, purse, identification, checkbook register, credit cards, makeup, compact disks, and other items. Allen used Barbara’s ATM card to withdraw cash in Huntington Beach at 11:49 a.m., and a charge a few hours later showed a gas purchase along Interstate 10, east of Indio. Earlier, a firefighter discovered Barbara’s mattress and bedding burning by a railroad track in Huntington Beach, about one-quarter mile from her home.

At the condominium, investigators found blood on the headboard, footboard, wall, mini blinds, nightstands, and carpet in Barbara’s bedroom. The mattress and box spring were missing. Testing revealed defendant’s DNA on the non-bloodstained portions of the victim’s pillowcase. There was also blood on a window sill by the stairway, on the upper landing wall of the stairway, and on the front door of the condominium. There was a box of latex gloves on the kitchen counter. Back in the bedroom, investigators found a bloody green and yellow sponge on one of the nightstands. Defendant’s DNA and Barbara’s blood were on the sponge.

Detectives monitoring Allen’s ATM usage learned of a gas station transaction along Interstate 10 in Sulphur, Louisiana, on September 15th. Surveillance footage from the station showed that, while Allen used the ATM, defendant purchased a

cold drink. Allen then discarded his cell phone and the ATM card into a trash can. The detectives contacted Louisiana authorities, who arrested the couple east of Sulphur.

The detectives interviewed defendant while she was still in Louisiana. She blurted out at the beginning of the interview, “Do you know that I was kidnapped? Do you know that?” After waiving her rights under *Miranda v. Arizona* (1966) 384 U.S. 436, defendant told the detectives she fell asleep between 10:00 and 11:00 p.m. the night Barbara was killed. In the middle of the night, defendant awoke, hearing her mother screaming for her. She ran to Barbara’s room and found Allen on top of her and stabbing her. Defendant tried to push Allen away, but he shoved her, knocking her out. According to defendant, after Allen killed Barbara, he held a gun to defendant’s head, stating, “You’re coming with me.” Defendant claimed she did not remember anything else until she awoke at the Starlight Inn, her body taped with duct tape. The detectives contacted the Inn, finding no record she or Allen or anyone resembling them stayed there.

Defendant denied assisting Allen in any way. When the detective asked defendant how Allen could move the victim’s body, her car, and Allen’s truck at the same time, she responded, “He couldn’t do that.” She explained Allen ordered her at gunpoint to disassemble Barbara’s bed and move her body. Defendant admitted that Allen left her waiting in his truck while he checked in at various motels during their flight, but she did not escape “[b]ecause I was scared for my life” The police recovered a .38-caliber revolver wrapped in a bandana in the driver’s side door pocket of Allen’s truck. Defendant was the major contributor of DNA found on the grip and trigger of the gun, while Allen was a minor contributor.

Transported back to California, defendant told the booking officer at the Huntington Beach jail that she feared her ex-boyfriend, Allen. She sought reassurance

several times, “You’re not going to let him hurt me, promise?” About 30 minutes later, as arranged by the detectives, the booking officer placed defendant in a patrol car with Allen, where a tape recorder was hidden. She assured Allen, “If you go to prison and I get out, I’ll wait for you.” When she asked, “Did you tell them you kidnapped me,” Allen responded, “They didn’t buy that for a second” Defendant advised Allen to “plead insanity.” She assured him, “I don’t hate you . . . I’ll never hate you. I’ll love you til the day I die, do you understand that?” She promised, [I]f I make bail, and I get out of this somehow, I’m gonna change my identity and change my appearance and I’ll come see you.” The couple then proceeded to tell each other several times, “I love you.”

Investigators recovered more than 400 text messages defendant sent to Allen between September 10th and 13th. Undercutting defendant’s claim she went to sleep on the night of the 12th around 10:00 p.m., Allen’s cell phone records showed a multitude of texts between the pair, including one from defendant at 10:15 p.m. stating, “I think my mom went to bed,” and Allen’s response, “That’s good. It must be quiet.” The texts continued until about 1:45 a.m., including texts from defendant stating, “She woke up. And she locked her bedroom doors,” “Ian, I don’t care what I have to do in order to be with you! Nothing is gonna take you away from me,” and “Let’s text for now and give my mom time to fall asleep. Meanie!” There were no texts between 1:45 a.m. and 6:28 a.m., when defendant texted Allen, “I love you,” and he responded in kind. Four minutes later, she texted him, “Are you in trouble?” And he responded, “nope.”

Defendant testified that she and Allen decided to run away together to escape her mother’s abuse. They chose the night of September 12th because her father would be away. Their plan was to wait until Barbara fell asleep, then she would meet Allen outside her home in his truck and they would drive to Florida. According to

defendant, Allen entered the condominium around 1:45 a.m. through the sliding glass doors. Barbara awoke when she heard Allen and defendant conversing, Allen and Barbara argued, and Barbara threatened to call the police to report Allen was kidnapping defendant. When Barbara entered her bedroom to use the phone, Allen followed her, shut the door, and attacked Barbara. Hearing the struggle, defendant entered the bedroom and tried to intervene, but Allen shoved her into a wall. After the killing, Allen again slammed defendant against a wall and directed her to retrieve cleaning materials from downstairs, and assist him in disposing of Barbara's body and belongings. Allen did not want defendant to "get in trouble" for assisting him after the murder, so they agreed that if they were arrested, she would say she had been kidnapped.

II

DISCUSSION

A. Prosecutorial Misconduct

1. Governing Principles

"Because we consider the effect of the prosecutor's action on the defendant, a determination of bad faith or wrongful intent by the prosecutor is not required for a finding of prosecutorial misconduct." (*People v. Crew* (2003) 31 Cal.4th 822, 836.) As observed by our Supreme Court, "[T]he term prosecutorial 'misconduct' is somewhat of a misnomer to the extent that it suggests a prosecutor must act with a culpable state of mind. A more apt description of the transgression is prosecutorial error." (*People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1 (*Hill*).)

Whether considered under the rubric of misconduct or error, the applicable federal and state standards are well established. "A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct "so

egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.”” [Citations.] . . .” (*Hill, supra*, 17 Cal.4th at p. 819.) Prosecutorial misconduct occurs under state law with ““““the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.”” [Citation.]” (*Ibid.*) “[I]n the absence of prejudice to the fairness of a trial, prosecutor[ial] misconduct will not trigger reversal.” (*People v. Bolton* (1979) 23 Cal.3d 208, 214.)

2. Opening Statement

Defendant contends the prosecutor committed misconduct by delivering an opening statement that was argumentative, misstated the evidence, and inflamed the jury’s passions. Defendant’s trial counsel, however, did not object below and, absent an objection, the claim is forfeited. (*People v. Wharton* (1991) 53 Cal.3d 522, 591.) Defendant fails to explain why an admonition at this early stage in the trial would have been futile. (*People v. Carter* (2003) 30 Cal.4th 1166, 1207 [request that trial court admonish jury to disregard misconduct necessary to preserve claim for review].)

As we explain, even assuming counsel should have objected and sought an admonition, defendant is not entitled to reversal of her conviction based on the prosecutor’s opening statement. There is no reasonable probability of a more favorable outcome for defendant had the prosecutor’s opening been cleansed of the remarks defendant now challenges. (*In re Clark* (1993) 5 Cal.4th 750, 766 [defendant’s burden to demonstrate prejudice requires a probability of a different result sufficiently high to undermine confidence in the verdict]; see *Strickland v. Washington* (1984) 466 U.S. 668, 697 (*Strickland*) [reviewing court need not determine whether counsel’s performance was deficient if defendant suffered no prejudice]; accord, *People v. Fairbank* (1997) 16 Cal.4th 1223, 1241.)

Defendant argues the prosecutor committed misconduct in her opening statement when she appealed to the passions of the jury by inviting them to imagine not just “the physical pain that Barbara Mullenix endured at the hands of her daughter and her lover,” but also “the pain that she knew it was the person she loved the most who did this to her.” We agree. It is “settled that an appeal to the jury to view the crime through the eyes of the victim is misconduct . . . ; an appeal for sympathy for the victim is out of place during an objective determination of guilt.” (*People v. Stansbury* (1993) 4 Cal.4th 1017, 1057 (*Stansbury*), revd. on another ground *sub. nom. Stansbury v. California* (1994) 511 U.S. 318; see also *People v. Fields* (1983) 35 Cal.3d 329 362 (*Fields*) [inviting jury “to view the case through the eyes of the victim” improperly pressures jury “to depart from their duty to view the evidence objectively” and “to permit sympathy for the victim to influence their verdict”].)

Since no testimony recounted the victim’s thoughts, the ploy was also argumentative in suggesting facts the prosecutor could not produce in evidence. (See *Stansbury, supra*, 4 Cal.4th at p. 1057, original italics [misconduct to implore jury: “*Think what she must have been thinking in her last moments of consciousness during the assault*” and “*Think of how she might have begged or pleaded or cried*”].) The prosecutor repeated the error of appealing to juror passions with irrelevant, outside-the-record claims the victim, while “far from perfect,” was a decent human being: “She had been in love a time or two. She had been 17 at one time, awhile back. She remembers what it’s like to be in love.” In a similar vein, the prosecutor erred by inviting juror identification and sympathy for the victim based on the murder location, her bedroom, “the most private place that *we* all have” (italics added), and by impliedly inviting “those of you who are parents” and “[t]hose of you who have children” or “parents that they

love” to view from the victim’s perspective or the perspective of a loved one “the facts that I will prove to you during this case” (See *Fields, supra*, 35 Cal.3d at p. 362 [improper to invite jurors to imagine themselves as the victim]; *People v. Pensinger* (1991) 52 Cal.3d 1210, 1250 [misconduct to ask jury to suppose crime had happened to their children].)

Defendant’s other claims of prosecutorial misconduct in the opening statement are without merit. As noted, the prosecutor erred in dramatizing the victim’s alleged final thoughts. But comments describing defendant’s intent did not constitute misconduct because they explained defendant’s actions and statements. For example, the prosecutor properly commented on defendant’s alleged motive: “As disturbing as th[e] thought can be to us, in her mind she believes her mother deserved to die” for intervening in her relationship with Allen.

Similarly, the prosecutor did nothing improper, as defendant suggests, by asserting the evidence would show defendant harbored a manipulative intent. The prosecution sought to prove defendant was not Allen’s hostage, as she claimed, but rather arranged her mother’s death. Accordingly, the prosecutor could state in her opening remarks, “The evidence will show that she got her lover not only to help her kill her mother,” but that “what this defendant wants this defendant gets.” (See *People v. Wash* (1993) 6 Cal.4th 215, 257 [““The purpose of the opening statement “is to prepare the minds of the jury to follow the evidence””].) The evidence demonstrated the victim’s perceived interference with their relationship prompted both Allen and defendant to slay her, but because the evidence would show defendant’s troubles with her mother predated Allen’s arrival on the scene, the prosecutor could suggest to the jury that defendant’s

long-festering resentment toward her mother prompted her to take the primary role in planning the murder.

The prosecutor also could claim the evidence would show defendant manipulated Allen, although she went too far with her argumentative comment, “Poor Ian Allen. She played him.” But the prosecutor could state the evidence would show defendant used her sexuality to influence Allen, contrary to her alibi he forced her to do his bidding and forced her to have sex with him, including during their postmurder flight.

To illustrate defendant’s malice, the prosecutor could prepare the jury to draw the inference that the lovers “used knives” to kill the victim because “knives is [*sic*] what’s going to make Barbara suffer.” (See *People v. Dennis* (1998) 17 Cal.4th 468, 518 [opening statement “prepare[s] the jurors to follow the evidence and more readily discern its . . . meaning”].)

Nor did the prosecutor misstate the evidence in stating Allen and defendant “[d]umped [Barbara] like a piece of garbage in [the] cold waters of Newport Bay,” or by commenting, after observing defendant’s father bought her a television, “She took the box from that television and used it as her mother’s coffin.” The prosecutor was not required “to describe relevant events in artificially drab or clinical terms.” (*People v. Millwee* (1998) 18 Cal.4th 96, 138.) The prosecutor’s vivid use of “garbage” and “coffin” constituted fair comment and notice to the jury the evidence would show the pair jettisoned an old cardboard box in which they had entombed Barbara. No misconduct made the prosecutor’s remarks inflammatory; to the contrary, the probative impact on a listener would stem from the nature of the evidence, not the prosecution’s apt characterization.

Defendant asserts “[n]othing quite beats the grand finale of the opening statement . . . , where the prosecutor . . . managed to simultaneously misstate what the evidence would be, argue the case, and attempt to inflame the jury’s passions[.]” Referring to forthcoming evidence of a prior incident of domestic violence between defendant and the victim, the prosecutor stated the officer responding to a 911 call “found Barbara had been attacked. She was injured. She was crying. She was upset. [¶] But, when she was asked to name her assailant, she was uncooperative. She didn’t want to think it. She didn’t want to believe it, that the daughter that she carried, gave birth to, fed, changed, dried her tears, laughed with [did this to her]. She had dreams for her. That person who she loved more than anyone else in the world had assaulted her.”³

Portions of this statement constituted prosecutorial error or misconduct, but not all of it. Defendant suggests the prosecutor misstated the evidence because, after Barbara initially declined to make a statement to the responding officer, “the one thing she did do was name Rachael as her assailant and provide her cell phone number.” The victim’s initial hesitation, however, sufficiently supports the prosecutor’s statement she “was uncooperative.” But the prosecutor’s appeal to sympathy for Barbara as a domestic violence victim mouthing an imaginary, overwrought interior monologue was not only bad theater but, as noted, improper argument.

The prosecutor’s argumentative comments in her opening statement do not require reversal, however. Courts considering similar error in misplaced appeals to juror sympathy have found no prejudice. (*Stansbury, supra*, 4 Cal.4th at p. 1057; *Fields*,

³ The prosecutor continued: “Ladies and gentlemen, this will be a difficult case to listen to. But the evidence, the evidence shows and proves, and you will be convinced beyond any reasonable doubt, this defendant brutally murdered, tortured her very own mother. For her own selfish, narcissistic, self-centered reasons. [¶] Thank you very much.”

supra, 35 Cal.3d at p. 362; *People v. Simington* (1993) 19 Cal.App.4th 1374, 1379; see generally *People v. Watson* (1956) 46 Cal.2d 818, 836.) So it is here. The trial court twice instructed the jury not to let sympathy influence its decision (Judicial Council of Cal. Crim. Jury Instns. CALCRIM Nos. 101, 200), alerted the jury to focus on the evidence previewed in the opening statement (CALCRIM No. 100 [“the purpose of the opening statement is to give you an overview of what the attorneys expect the evidence will show”]), and cautioned the jury the attorneys’ remarks were not evidence (CALCRIM Nos. 104, 222). We presume the jury heeded these instructions and disregarded the prosecutor’s improper comments. (*People v. Clair* (1992) 2 Cal.4th 629, 663, fn. 8 (*Clair*) [presuming “that jurors treat the court’s instructions as a statement of the law by a judge, and the prosecutor’s comments as words spoken by an advocate in an attempt to persuade”].) Moreover, the jury demonstrated its ability to resist emotional appeals against defendant and instead focus on the facts by rejecting the allegation defendant personally used a knife in the murder. In sum, the prosecutor’s fictional depictions of the victim’s final thoughts and similarly misplaced emotional appeals do not warrant reversal.

3. Denial of Mistrial Following Prosecutor’s Display of Excluded Evidence

At the close of the prosecution’s case, the trial court considered the prosecutor’s request to admit four letters defendant wrote from jail, one of which included a poem or lyrics defendant had copied in her handwriting, entitled, “Female Player.”⁴ The prosecutor sought to introduce the poem and letters to support the

⁴ The body of the poem, with original ellipses but line breaks removed, read: “You call yourself a player cause it seems you played a few [¶] You didn[’]t seem to realize it was me playing you It[’]s true you were good at your game and came out a winner [¶] But compared to me, you were still just a beginner. There’s lots of learning. [A]nd you ain[’]t shit yet!!! If you didn[’]t give a fuck then why are you so

prosecution theme that, far from being a kidnap victim forced by Allen to clean the crime scene and help him flee, defendant fully intended and procured her mother's murder. Indeed, the prosecutor argued throughout the trial that defendant used her relationship with Allen, including having sex with him, to manipulate him to commit the crime with her.⁵

After lengthy argument by counsel outside the jury's presence and a subsequent recess, the trial court ruled: "I have again reviewed the four disputed items . . . [including the poem], and I think the defense objection, 'relevance,' is well[-]founded." The court added, "[I]f they have any relevance, . . . the defense[']s Evidence Code section] 352 objection is also well-founded," explaining the evidence's probative value was "nil" and, "even if it has some minimal probative value, that's outweighed by its potential for undue confusion of the issues and undue prejudice" The court noted: "I think this is really character evidence and the jury's being asked to conclude . . . that defendant's a bad person because of the things that are said in these letters" Concluding the material "should probably be marked and made a part of the record *for appellate review purposes*" (italics added), the court observed, "I should say that [the] ruling regarding these letters and the poem is only based on the offer of proof at this stage in the proceedings, specifically with respect to the People's case in chief," and acknowledged that "if and when defendant testifies in this case," the court's rulings

upset [¶] Although you tried to play me . . . things didn[']t end up your way . . . cause you[']r[e] begging me to stay . . . [¶] How does it feel to lose? How does it feel to be a failure? [¶] How does it feel to be played . . . by a female player?"

⁵ For example, the prosecutor confronted defendant during cross-examination with defendant's letter, which read, "You know, it's funny how you can control men with sex. . . ."

“*could* be a whole different matter with respect to those letters and that poem.” (Italics added.)

While cross-examining the first defense witness, a psychologist, Dr. Veronica Thomas, the prosecutor displayed the “Female Player” poem to the jury as part of a computer projection. When the trial court noticed the poem, the court ordered, “Turn the computer off, counsel. Turn the screen dark. This document has not been in evidence.” The prosecutor interjected, “Your honor,” but the court reiterated, “Turn the computer off at this time. Turn the computer off.” The prosecutor responded, “I don’t know how to do that. I moved the slide.” The trial court excused the jury, ordering counsel to remain. The prosecutor claimed the poem only had been displayed for a few seconds; defense counsel asserted the poem was onscreen for a minute and one-half, and the trial court estimated the duration was “at least 30 seconds, maybe more”

Addressing the prosecutor, the court observed, “Nothing. Nothing. Nothing . . . should ever be shown to the jury, if there’s a dispute about whether it’s going to be admitted into evidence.” Noting it had “specifically” excluded the poem in its earlier ruling, the court chastised the prosecutor: “To display it without warning, without discussion is completely improper in my view. There’s no excuse for it. It’s just outrageous and I’m not going to tolerate it.” When the prosecutor stated, “I know that your Honor is very upset with me right now,” the court clarified, “I’m not upset with you. I’m just appalled. I can’t believe that an officer of the court would engage in such matters which is, in my view, outrageous.” The prosecutor replied, “I understand that that is your view.”

The prosecutor’s conduct was inexcusable. The prosecutor denied “bad faith on my part,” but even inexperienced trial attorneys understand the obligation to

advise counsel and the court before introducing evidence the trial court specifically had excluded after a hearing on its admissibility.

The Attorney General asserts “[t]he court’s outburst notwithstanding, the prosecutor committed no misconduct in cross-examining Dr. Thomas about the poem” because defense counsel and the prosecutor elicited from Thomas that she had reviewed defendant’s writings, including “poems” and “mail.” The Attorney General therefore concludes “[t]he prosecutor was entitled to ask Thomas whether she considered [the poem] in forming her opinion” that defendant was dependent, hopeless, and easily manipulated. But the evidentiary merit of the prosecutor’s stratagem is beside the point. The trial court’s earlier exclusion order required obedience to the order or a request for the court to reconsider the matter. The issue is not whether the prosecutor “was ‘right.’” (*People v. Pigage* (2003) 112 Cal.App.4th 1359, 1374 (*Pigage*)). An attorney is never “right” in flouting a court order, whether through sheer ignorance or bad faith. “[T]he correctness of the court’s decision is not the issue. ‘It is the imperative duty of an attorney to respectfully yield to the rulings of the court, *whether right or wrong*. [Citations.]’ [Citation.] As an officer of the court, [the prosecutor] owes a duty of respect for the court. (Bus. & Prof. Code, § 6068, subd. (b).) . . . [The prosecutor’s] decision to defy the court’s order is outrageous misconduct.” (*Ibid.*, original italics.)

The Attorney General also attempts to justify the prosecutor’s conduct because “the court told the prosecutor that the poem could not be displayed during ‘the People’s case in chief’” and therefore, “[a]t a minimum, the court’s comments regarding the timing of the display were confusing.” According to the Attorney General, “the court during the in limine hearing [failed to] advise or ask the parties to seek additional guidance regarding the exhibit once the defense began its case,” so “the most that can be

said was that there was a misunderstanding as to when it could be displayed.” This might ring true if the court had excluded the evidence only on relevancy grounds. But the court found the prejudicial effect of the poem and the letters substantially outweighed any minimal probative value and therefore the evidence was excluded for all purposes. We have reviewed the record and there was nothing confusing about the court’s order excluding the evidence. A denial under Evidence Code section 352 of the prosecutor’s motion to admit the evidence does not transmute into a motion granted upon a prosecutor’s say-so. The court had no duty to “advise or ask” the parties to comply with its ruling (see *Pigage, supra*, 112 Cal.App.4th at p. 1374), and the court’s acknowledgement it “could” revisit the matter furnished no basis in reason to ignore the trial court’s ruling.

Defense counsel did not immediately consider mistrial as the only suitable remedy for the prosecutor’s misconduct. When asked by the trial court for input on the matter, defense counsel stated, “I guess a person could ask for a mistrial,” but sought “a few minutes before I want to make that decision.” Counsel eventually requested a mistrial, but the court concluded, “I don’t think that this is a problem that can’t be cured.” The court recalled the jurors into the courtroom and admonished them: “Ladies and gentlemen, before we go any further I want to reiterate a couple instructions that I gave you before and give you . . . some new direction as well. You may recall I told you long, long ago when we started this trial, nothing, nothing that the attorneys say is evidence. Their opening statements and their closing arguments, the attorneys discuss their case, but their remarks are not evidence. Their questions are not evidence. Only the witnesses’ answers are evidence. The attorneys’ questions are significant only if they help you to understand a witness’s answer. Do not assume that something is true just

because one of the attorneys asks a question that[] suggested it is true. [¶] You'll recall in the cross-examination of Dr. Thomas by Ms. Balleste we were shown part of a PowerPoint presentation. I'm instructing you now to disregard in its entirety everything that was displayed in that PowerPoint presentation. You are not to allow it to enter into your deliberations o[r] your verdict in any way."

Defendant now contends the trial court's admonition was insufficient to cure the problem. Indeed, defendant suggests the jury would believe the court's instruction was designed to conceal relevant evidence pursuant to "some mysterious 'legal technicality' . . . work[ing] to the benefit of criminal defendants at the expense of the truth." Defendant's theory is based on nothing more than speculation and is an unlikely occurrence here, where the trial court explained the rule that attorney presentations are not evidence. We presume the jury heeded the court's admonition. (*Clair, supra*, 2 Cal.4th at p. 663, fn. 8.)

Resisting this conclusion, defendant relies on the exception for "'improper subject matter . . . of such a character that its effect . . . cannot be removed by the court's admonitions.'" (*People v. Allen* (1978) 77 Cal.App.3d 924, 935.) The exception does not apply. The fleeting display of a poem that was never attributed to defendant, and which the jury likely had little time to read, digest, or recall, simply does not have the "electric effect " required to conclude the jury disobeyed the court's instructions. (*People v. Brophy* (1954) 122 Cal.App.2d 638, 652 [prosecutor produced in closing argument a theretofore-missing bullet never admitted in evidence; instruction inadequate to cure prosecutorial misconduct]; accord, *People v. Gould* (1960) 54 Cal.2d 621, 628 ["exceptional circumstances" required to conclude jury disregarded court's admonition], overruled on another ground in *People v. Cuevas* (1995) 12 Cal.4th 252, 257.) Thus, the

trial court did not err in denying defendant's mistrial motion, and the court's admonition sufficed to cure the prosecutor's misconduct in placing the poem onscreen.

4. Cross Examination of Defendant

a. Publication of Other Letters

Defendant contends the prosecutor committed misconduct by publishing the contents of three other jailhouse letters defendant wrote. Defendant complains that instead of doing so via computer projection, the prosecutor referred to portions of the letters in the questions she put to defendant on cross-examination. Pressing defendant on her claim Allen sometimes forced her to have sex even though she said "no," the prosecutor asked, drawing from a letter defendant wrote from jail to another male long after the offense, "Have you ever said that . . . in a relationship . . . the way you like to have sex, that you just want somebody to take you and not be afraid to get a little rough with you sometimes?" Defendant protested she wrote those words in the context of a different relationship with a different individual and, in any event, "no" would still mean "no." The prosecutor pursued the issue with snippets from two other letters before defense counsel objected. Specifically, the prosecutor excerpted from a second letter that defendant claimed she was "actually quite shy when it comes to sex," merely to impeach her with language in the third letter where defendant implied a sexual encounter by telling the recipient that, if he kissed her, "I would probably say, "Let's go home. . . ."

By not objecting earlier, defendant forfeited any complaint about the prosecution's inclusion of excerpts from defendant's letters. As the trial court explained during an earlier sidebar, "If something is being shown to the jury and it's not in evidence, I'm going to assume there is no objection from the defense In other

words, the time to object is the first time . . . it's proposed to be shown to the jury." But defense counsel's failure to object was harmless. In a fourth letter, which the trial court earlier had ruled was admissible, defendant wrote, "You know it's funny how you can control men with sex. It really is. It's like one of their worst fears. At least that's the way you control him. Sick fucker. Fucking men. They are only good at one thing sometimes. LOL [Laughing Out Loud]." This more damaging, properly admitted evidence rendered defendant's brief comments about sex in other letters, at most, cumulative and inconsequential. Consequently, the lack of an objection did not prejudice defendant. (*Strickland, supra*, 466 U.S. at p. 697.) Additionally, as will become apparent, the trial court began to keep a very short leash on the prosecutor, chastising her with sharp and appropriate admonitions that prevented any prosecutorial errors from derailing the trial.

b. Sarcastic Remarks Disparaging Defendant

Defendant contends the prosecutor committed misconduct in cross-examining her about a text message she sent to Allen a few days before her mother was killed. The message read: "We have only two options if you want to be with me. Run or Tuesday. Or the last option you come over tonight and apologize to my mom. You decide if you want to be with me." Barbara was killed on a Tuesday. When defendant claimed she meant to type "Run on Tuesday," referring to her plans to run away with Allen, the prosecutor approached with a cell phone, stated derisively, "Does this refresh your memory about cell phones," and quipped sarcastically, "That's some typo, Ms. Mullenix." Just before defense counsel objected, the trial court interjected, "Ms. Balleste, these comments are inappropriate," and sua sponte admonished: "The jury will disregard those remarks, and counsel will refrain from making such remarks."

The next day, the prosecutor made a similarly sarcastic rejoinder to one of defendant's answers,⁶ prompting the trial court to call a sidebar. At the sidebar, the trial court dressed down the prosecutor: "Yesterday, you were admonished twice for this. I am not going to tolerate it. This is contemptuous. You are warned. Never again will I tolerate this from you." (See *Hill, supra*, 17 Cal.4th at p. 833 [holding the "'gravity of the human interests at stake in a criminal trial demands . . . orderly and dignified' proceedings"].) The trial court admonished the jury to disregard the prosecutor's "completely improper" comments. Specifically, the court directed the jury: "Ladies and gentlemen, it's completely improper for the district attorney to make comments such as the comments that you just heard. And I'm now instructing you to disregard that comment, not to allow it to enter into your deliberation or verdict in any way."

The trial court's strong medicine cured any potential harm. Resisting this conclusion, defendant cites authority observing prosecutors "are government officials . . . clothed with the dignity and prestige of their office," such that "[w]hat they say to the jury is necessarily weighted with that prestige." (*People v. Talle* (1952) 111 Cal.App.2d 650, 677.) While true enough in the abstract, defendant's observation ignores the context here, where the spectacle of seeing the court sustain objections to the prosecutor's questions and frequently admonish the prosecutor seems likely to have reflected more poorly on the prosecutor than the defendant. Defendant also emphasizes the importance of the text message, since the jury requested a copy of it during deliberations. But even a primary witness for the prosecution, Detective Steven Mack, conceded the message was ambiguous and "subjective," acknowledging it was open to an interpretation that could

⁶ After the prosecutor asked, "[Did] you threaten to be out of [Allen's] life, break up with him, give him back his [sweatshirts]," defendant replied, "I'm sure there was a reason that I said that," and the prosecutor rejoined, "I'm sure there was, Ms. Mullenix, that's true."

favor the defense based on the typo, thereby undermining the prosecutor's derisive comment to defendant. Moreover, we presume the jury afforded more deference to the trial court than to the prosecutor's diminishing prestige, heeding the trial court's forceful admonition to ignore the prosecutor's asides when interpreting the message. (*Clair*, *supra*, 2 Cal.4th at p. 663, fn. 8.)

c. The "Broken" Knife

Defendant contends the prosecutor misstated the evidence during cross-examination by asking defendant, "Are you aware that the folding knife that was recovered with the bedding broke?" Defendant replied, "No." During the next break in testimony, the trial court inquired what evidence supported the prosecutor's conclusion the knife broke, worrying the import "was that somehow the blade had snapped off" during the attack. The court expressed concern "this is another series of evidence that's not in the record [but is] referenced in front of the jury. It troubles me greatly." The prosecutor clarified, "The blade did not snap off" and "It's not that kind of broken." The prosecutor apparently inferred that the knife was broken because, as the Attorney General describes it, a photograph depicted the knife in a "half-closed" position. But a photograph of a knife in one position furnishes no basis to conclude the other positions are inoperable.

Defendant suggests the prosecutor's misstatement misled the jury on "the ferocity of the attack," assuming the jury might infer as the court had that the blade had broken off. But the jury had the exhibits, including the photograph of the intact knife, to review during deliberations, and the photograph dispelled any suggestion the knife blade broke off. In any event, the jury acquitted defendant of the knife enhancement, undermining the notion the jury would succumb to the prosecutor's insinuations.

Additionally, ample evidence — including the butter knife protruding from the victim’s eye socket — demonstrated the ferocity of the attack; accordingly, there is no possibility the jury convicted defendant of the murder charge based on the innocuous depiction of a half-closed knife. The prosecutor’s description of the knife rested on a groundless inference, but was ultimately harmless.

d. Inflammatory, Derisive Characterizations of Defendant’s Boyfriend

Defendant complains the prosecutor used increasingly sarcastic and derisive characterizations of defendant’s boyfriend, Allen, to degrade her in front of the jury. For example, critiquing defendant’s claim she refused to have sex with Allen after the murder while en route to Florida, the prosecutor commented, “And this time, Ian, the sometimes rapist, stopped?” The prosecutor also queried about the flight to Florida, “You stayed with your murdering rapist boyfriend, right?” The prosecutor then asked, in relation to defendant’s apprehension in Louisiana, “[Y]ou no longer have your abusive kidnapper rapist murderer boyfriend telling you what to do?” Defense counsel objected, and the trial court called a sidebar to upbraid the prosecutor: “Cross-examination is just about over, counsel. This is just completely over the top. I’ll tell them to turn off the TV cameras if you cannot behave. This is just unacceptable. How many times are we going to have to hear you make the argumentative question about the murdering rapist? This is just not permitted. You know it; I know it. Mr. Cohn has been very kind not to object until this point. It is not going to continue. You must ask questions, counsel, and wait for answers. You’re not testifying, you’re not performing on national TV. This is a trial in a court of law. And you will behave accordingly.”

Contrary to the Attorney General’s suggestion, the record does not reflect the trial court admonished the jury specifically to disregard the prosecutor’s

argumentative questions at this point. But the trial court, after admonishing the prosecutor in the sidebar, informed the jury it sustained defense counsel's objection that prompted the sidebar. The court later instructed the jury generally at the close of the case, "If I sustained an objection, you must ignore the question." (See CALCRIM No. 222.) We presume the jury heeded the trial court's instruction and ignored the prosecutor's question, including the derisive language in the question. (*Clair, supra*, 2 Cal.4th at p. 663, fn. 8 [presuming jurors followed court's remedial instructions and viewed the "prosecutor's comments as words spoken by an advocate in an attempt to persuade"].)

5. Closing Argument

a. Misstating that One Attacker Was a Physical Impossibility

Midway through the prosecutor's closing argument, the trial court called a recess and rebuked the prosecutor after she argued to the jury: "Her body is telling us with its wounds and its blood, it's telling us *she could not have been murdered by one person. It's physically impossible* for her to have defensive wounds, which means she's fighting, then have 50-plus stab wounds with three to four different blades all around the same period of time. *Could not happen. Physically impossible.* [¶] So, even if you believe that Ian Allen is stabbing Barbara Mullenix, he didn't do that alone. *And impossible.*" (Italics added.) The trial court chastised the prosecutor concerning her "physical impossibility" claim: "No witness ever said that in this case, not even close." As defense counsel explained, while the prosecution's expert testified the victim's wounds were consistent with an attack by "more than one person," the expert admitted on cross-examination that "it could have been one person." The expert never testified one

attacker was a physical impossibility, but rather “specifically said . . . he could not rule out one person”

The Attorney General justifies the prosecutor’s misstatement by arguing the prosecutor “merely asked the jury to draw the inference, from the nature and number of wounds, that two people must have stabbed Barbara.” Not true. More than asking for an inference of two attackers, the prosecutor stated the evidence established any conclusion besides multiple attackers was untenable as a physical impossibility. The prosecutor falsely suggested the evidence established it was “physically impossible” the victim had “been murdered by one person.” The prosecution’s own expert refuted the prosecutor’s erroneous statement.

Recalling the jury to the courtroom, the trial court instructed the jury: “All right. Ladies and gentlemen, before we took the break the prosecutor was making [an] argument about physical impossibility. The defense has objected to that argument on the ground that it misstates the evidence, or assumes fact[s] not in evidence. That objection is sustained. Ms. Balleste’s statements concerning physical impossibility are stricken. The jury’s instructed to disregard those remarks. You may not draw any inference from this statement. It is your duty to consider only the evidence presented in this case. ¶¶ And, as I’ve told you many times throughout this trial, counsels’ statements, including their statements here in closing argument are not evidence in this case.”

The jury could not have helped but notice the prosecutor retreated from her erroneous position after the trial court reprimanded her during the recess. The prosecutor stated, “Dr. Enloe said” that “these injuries were inflicted upon her by her assailant on or about the time of death.” Correctly observing, “Dr. Enloe also said that these types of injuries *can be consistent with two assailants*,” the prosecutor argued that “the

permissible inference is that Rachael Mullenix is an active participant in her mother's murder." (*Italics added.*) The prosecutor emphasized that the victim was "killed with at least three, three knives, possibly four," thus insinuating defendant wielded one of the weapons. The jury demonstrated its ability to separate prosecutorial argument from the evidence by rejecting the personal knife use enhancement. And because the prosecutor's retreat in effect disavowed her erroneous physical impossibility argument, there is no reason to suppose the jury gave it any weight; rather, we must presume the jury heeded the trial court's admonition to disregard it. (*Clair, supra*, 2 Cal.4th at p. 663, fn. 8.)

b. Display of a Movie Poster Not Admitted into Evidence

Defendant notes that when the trial court reprimanded the prosecutor off the record for her physical impossibility misstatement, the trial court also pointed out the prosecutor had violated a court order by displaying in her closing argument a movie poster that had never been admitted into evidence. The prosecutor projected the poster onscreen in a computerized slide presentation for the jury to view during her closing argument. Before closing argument, based on the prosecutor's repeated missteps, the trial court prepared and provided to both counsel "a list [of] things that . . . are permissible in closing argument, and things that are impermissible in closing argument." The list, as described by the trial court on the record, informed counsel, "You cannot show things to the jury that are not in evidence."

The prosecutor violated the court's order by displaying in her computer presentation a promotional poster for the movie defendant and Allen saw a few days before the murder, entitled, "Lady in the Water." The Attorney General parrots the prosecutor's excuse to the trial court, namely, that the poster constituted a demonstrative aid. But the Attorney General, like the prosecutor, fails to explain what, if anything, the

poster aided in demonstrating. The case relied upon by the Attorney General explains that a demonstration gun or fishing lure may be used to illustrate witness testimony about a defendant's alleged manner of using a gun or lure, when the actual items used by the defendant have not been recovered. (*People v. Roldan* (2005) 35 Cal.4th 646, 707-710 (*Roldan*), overruled on another point in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) In contrast, there is nothing about a teenage couple attending a movie that requires a movie poster for the jury to understand this common experience. At the very least, the prosecutor should have secured the court's express permission ahead of time.

The danger was that the jury would view the poster as actual evidence for their consideration. The poster did not demonstrate or illustrate any relevant evidence about the couple's trip to the theater; it did not substitute for absent evidence the way true demonstrative evidence would. (See *Roldan*, *supra*, 35 Cal.4th at pp. 707-710.) Instead, in effect, the prosecutor presented the poster, with its depiction in the trial court's words of "a lady who's floating in the water or who's wet," as something defendant and Allen observed at the theater or elsewhere, but there was no evidence of this. The court explained, "Counsel, it's elementary. First year lawyers know this. You cannot show the jury things that are not in evidence. How many times do I have to make this point? This is the fifth time you've been admonished for this in the course of this trial." To prevent a reoccurrence, the trial court excised other unadmitted evidence from the remainder of the prosecutor's presentation.

We conclude defendant suffered no possible prejudice from the display of the movie poster, which was primarily an affront to the court as a violation of its earlier order. The jury knew from witness testimony that "Lady in the Water" was the name of the movie defendant and Allen saw, as disclosed by the theater tickets recovered from

Allen's wallet when he was arrested. The movie poster added nothing of consequence to prejudice defendant. Defendant complains the poster had foreboding and prejudicial aspects the trial court "apparently did not see," including an epigraph ("Time is running out for a happy ending") and demonic creatures hidden in the poster artwork. But the epigraph was in small print and no creatures are visible in the reproduction in the appellate record of the prosecutor's slide. Because the trial court did not, as defendant concedes, notice the poster details she now complains about, it is likely the jury also overlooked the details. We are satisfied beyond a reasonable doubt that viewing the movie poster did not influence the jury in reaching its verdict.

c. Media Presence, Cumulative Error, and Denial of New Trial Motion

Defendant asserts that once the trial court became concerned the prosecutor was performing for the media cameras in the courtroom, the court violated her right to a fair trial by not terminating the video coverage. "[T]he standard is whether the camera equipment, the broadcasts, or the prospect of future broadcasts adversely affected defendant's trial and amounted to a denial of due process." (*People v. Dixon* (2007) 148 Cal.App.4th 414, 441; see Cal. Rules of Court, rule 1.150 [court has discretion to permit broadcast of judicial proceedings if "executed in a manner that ensures that the fairness and dignity of the proceedings are not adversely affected"].) Defendant also argues the cumulative prosecutorial misconduct denied her a fair trial and, consequently, the trial court erred in denying her new trial motion on that ground. We conclude defendant was not entitled to a new trial and is not entitled to a reversal of the judgment because, as discussed, the trial court's active intervention, often sua sponte, cured virtually all of the prosecutor's misconduct.

As noted, near the end of the trial as the prosecutor was cross-examining defendant, the trial court called a recess and chastised the prosecutor: “Cross-examination is just about over, counsel. This is just completely over the top. I’ll tell them to turn off the TV cameras if you cannot behave. This is just unacceptable. How many times are we going to have to hear you make the argumentative question about the murder[ing] rapist? . . . You’re not testifying, you’re not performing on national TV. This is a trial in a court of law. And you will behave accordingly.”

Later in the day, as the trial moved towards closing arguments, the trial court alerted counsel it was “considering” removal of video equipment because “[i]t appears to me that it’s having a deleterious effect on the conduct of this trial.” Both counsel denied it affected their performance. When representatives for CBS News requested keeping the cameras on “through closing and the verdict,” the court observed, no doubt commenting on the prosecutor’s performance, “[Y]ou’ve got the opening statement, which . . . really looked like a closing argument. You can cut and paste that in and call that a closing argument, as near as I can tell”

The trial court explained to the media representatives, “I have to balance the defendant’s constitutional rights to a fundamentally fair trial, which, in my view, is implicated here at this point in the proceeding. The court expressed concern the “presence of the cameras in the courtroom has encouraged . . . behavior . . . by one or the other of the lawyers that is, I think, improper and would not have occurred but for the presence of the cameras,” explaining, “In my 250 some-odd trials, I’ve never had TV cameras in the courtroom, and I’ve never had these kind of problems thus far.” The court later determined to resolve its concerns by providing counsel with an express list of “things that are impermissible in closing argument.” The court warned it reserved the

“right at any point in the proceedings to terminate the videotap[ing] if I feel it is having a negative effect on the trial.”

As noted, the prosecutor ignored the trial court’s list and displayed the unadmitted movie poster. The trial court did not admonish the jury to ignore the poster, but the poster could not have affected the verdict. Defendant asserts that display of the poster, aggregated with other prosecutorial errors, rose to the level of cumulative misconduct denying her a fair trial. But as we explain, we conclude defendant’s cumulative error contention is without merit. The trial court’s intervention safeguarded defendant’s right to a fair trial, and therefore the court did not err in declining to halt the media taping.

Besides display of the movie poster, the only other prosecutorial errors the trial court failed to immediately correct during the trial were her brief appeals to sympathy for the victim in her opening statement and her assertion the knife was broken. As we have explained, these improper prosecutorial tactics did not prejudice defendant individually. We also conclude they did not cumulatively deny defendant a fair trial because they were few in number and of minimal impact. (See *People v. Kronemyer* (1987) 189 Cal.App.3d 314, 349 [“litmus test” of cumulative error analysis “is whether defendant received due process and a fair trial”].)

The trial court counteracted the prosecutor’s other misconduct with stern admonitions and forceful, specific directions to the jury to ignore the “Female Player” poem, the prosecutor’s argumentative “some typo” and “I’m sure there was” comments, and the prosecutor’s physical impossibility misstatement. The trial court also sustained a defense objection directed at the prosecutor’s argumentative “murdering rapist” phraseology during cross-examination. Together with the uncorrected misconduct noted

in the preceding paragraph, these incidents constitute the sum of prosecutorial misconduct defendant alleges in the trial. We presume the jury heeded the trial court's admonitions and disregarded the incidents it was told to ignore. Consequently, there is no basis for cumulating these prosecutorial errors with the uncorrected ones. The trial court worked diligently and with vigilance to assure defendant a fair trial and, in our view, succeeded. Accordingly, the court did not err in allowing the media cameras to remain in the courtroom or in denying defendant's new trial motion.⁷

C. Evidence of Prior Domestic Violence

Defendant asserts the trial court erred by admitting, under the domestic violence provisions of Evidence Code section 1109,⁸ evidence of her 2004 assault on her mother in Florida. Defendant contends the trial court should have excluded the evidence as more prejudicial than probative under section 352 because the Legislature never intended section 1109 "to cover acts of violence involving minors against non-dependent adults," but rather the converse: child abuse by adults. Defendant's reliance on section 352, however, is misplaced. If defendant is correct that section 1109 does not apply to domestic violence perpetrated by a child, the Florida evidence would be irrelevant and inadmissible as a matter of law. (See § 350 [only relevant evidence is admissible].) Section 352 would not come into play because it simply provides for

⁷ Defendant suggests the trial court sua sponte should have removed her retained trial counsel and appointed a substitute attorney to argue the new trial motion because counsel's failure to object to several instances of prosecutorial misconduct created a conflict for him when he raised those instances in the new trial motion. Our conclusion defendant is not entitled to a reversal moots her argument.

⁸ All further unlabeled statutory references in part II.C. are to the Evidence Code.

exclusion where the probative value of relevant evidence is outweighed by prejudice in admitting it.

On the merits, defendant's claim fails because section 1109, subdivision (d)(3), provides for admission of past acts of "domestic violence" as defined in Family Code section 6211, which includes "abuse perpetrated against . . . [¶] [a]ny . . . person related by consanguinity or affinity within the second degree." (Fam. Code, § 6211, subd. (f).) The evidence of defendant's 2004 assault was therefore admissible because defendant fell within the applicable degree of relation with her mother.

Defendant's reliance on *People v. Dallas* (2008) 165 Cal.App.4th 940 is misplaced. There, the appellate court described legislative history showing an interest in preventing child abuse *prompted* the Legislature to expand the definition of domestic violence in section 1109 by incorporating the definition of abuse in Family Code section 6211. But this historical fact introduces no ambiguity into the language the Legislature actually used in section 1109, incorporating in whole and not in part Family Code section 6211, including the consanguinity and affinity terms in subdivision (f) that plainly apply to a child's abuse of a parent. (See *People v. Leal* (2004) 33 Cal.4th 999, 1008 [“When “statutory language is . . . clear and unambiguous there is no need for construction, and courts should not indulge in it””]; *People v. Farrell* (2002) 28 Cal.4th 381, 394 [courts may not turn to extrinsic aids, including legislative history, unless statutory language is ambiguous].) Consequently, the trial court did not err by admitting the Florida incident under section 1109.

Defendant also argues the trial court violated her confrontation rights under the Sixth Amendment by allowing the responding officer in the Florida incident to testify Barbara identified defendant as her attacker. (See *Crawford v. Washington* (2004)

541 U.S. 36, 68 (*Crawford*) [testimonial evidence by an unavailable witness requires prior opportunity for cross-examination].) The then-recent United States Supreme Court decision in *Giles v. California* (2008) __ U.S. __ [128 S.Ct. 2678, 2683-2684] held that the right of confrontation applies to all testimonial statements, including those made by a domestic violence victim later killed by her abuser, unless the abuser killed the victim to prevent her from testifying. Defendant, however, did not object to the admission of the Florida deputy's testimony on confrontation grounds or under *Crawford* or *Giles*. Defendant therefore forfeited her confrontation challenge. (§ 353; *People v. Chaney* (2007) 148 Cal.App.4th 772, 779 (*Chaney*).)

Resisting this conclusion, defendant relies on the proposition that forfeiture does not apply where “the new arguments do not invoke facts or legal standard different from those the trial court . . . was asked to apply” (*People v. Boyer* (2006) 38 Cal.4th 412, 441, fn. 17.) Close examination of the record reveals defendant did not object to the deputy's testimony on confrontation or even hearsay grounds, but instead sought exclusion of the Florida incident as propensity evidence barred by section 1101 and inadmissible as domestic violence under section 1109. Accordingly, because defendant did not object on confrontation grounds, neither the trial court nor the prosecution had “the opportunity to meet and cure any defect to which an objection has been made,” and the issue is therefore forfeited for appellate review. (*Chaney, supra*, 148 Cal.App.4th at p. 779.) Specifically, absent a confrontation objection, the prosecution had no reason to establish that, under *Davis v. Washington* (2006) 547 U.S. 813, 826-829, the statement Barbara gave the officer was a nontestimonial response in what appeared to be an ongoing emergency, and therefore outside the scope of *Crawford*, *Giles*, and the Sixth Amendment. We reserve for consideration in defendant's pending

habeas claim (*In re Rachel Scarlett Mullenix*, G042543), her assertion her trial counsel rendered prejudicial ineffective assistance of counsel by failing to raise a confrontation objection to the deputy's testimony.

Finally, defendant contends the trial court erroneously modified the CALCRIM No. 852 instruction it gave to the jury concerning prior domestic violence. Defendant did not object to the modification, but apparently relies on the rule that the absence of an objection does not require forfeiture of instructional error prejudicing the defendant's substantial rights. (See *People v. Cabral* (2004) 121 Cal.App.4th 748, 750; Pen. Code. § 1259.) The omissions here, however, were immaterial.

First, defendant complains the trial court omitted the language "but are not required to" from the formulation: "you may, *but are not required to*, conclude from that evidence [i.e., evidence of prior domestic violence] that the defendant was disposed or inclined to commit domestic violence" (CALCRIM No. 852, italics added.) But the word "may," since it is permissive rather than mandatory, notified the jury it was not required to make any particular conclusion.

Second, defendant complains the court's modified instruction "told the jury to consider the domestic violence evidence without telling them how to consider it." But in the very next sentence of defendant's opening brief, defendant concedes "[i]t is hard to imagine the jurors took [the court's modified instruction] to mean anything other than that they could consider appellant's disposition to commit violence against her mother" That is precisely true. Defendant seems to assume section 1101's general bar to disposition evidence applies, but the very purpose of section 1109 is to allow such

evidence in offenses involving domestic violence — here, murder of one’s mother.⁹

There was no error.

III

DISPOSITION

The judgment is affirmed.

ARONSON, J.

WE CONCUR:

O’LEARY, ACTING P. J.

IKOLA, J.

⁹ As pertinent here, the trial court’s modified version of CALCRIM No. 852 stated: “If you decide that the defendant committed the uncharged domestic violence, you may consider that evidence and weigh it together with all the other evidence received during the trial to help you determine whether the defendant committed murder. [¶] Remember, however, that evidence of uncharged domestic violence is not sufficient alone to find the defendant guilty of murder. The People must still prove each element of murder beyond a reasonable doubt.”